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No. 145

Joint Br. of Atty. Gen. (Pleading)

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JAMES H. MCKENNEY,
Clerk

Filed Nov. 10, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILROAD COMPANY, A corporation, and Northern Pacific Railway Company, a corporation, appellees.

No. 145

PENDING ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO REQUIRE THE WHOLE CAUSE TO BE SENT UP FROM CIRCUIT COURT OF APPEALS, AND MOTION TO ADVANCE; OR, IF THE WHOLE CAUSE IS NOT SENT UP, TO DISMISS FOR WANT OF JURISDICTION.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILROAD COMPANY, A corporation, and Northern Pacific Railway Company, a corporation, appellees. } No. 477.

PENDING ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO REQUIRE THE WHOLE CAUSE TO BE SENT UP FROM CIRCUIT COURT OF APPEALS, AND MOTION TO ADVANCE; OR, IF THE WHOLE CAUSE IS NOT SENT UP, TO DISMISS FOR WANT OF JURISDICTION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Come now the parties to the above-entitled cause and join in moving the court as follows:

I.

For an order requiring the whole record in the cause above entitled to be sent up by the circuit court o appeals to this court for its consideration.

II.

For an order advancing the said cause for hearing before this court, upon the ground that the United

States is concerned in said cause and upon the ground that it involves matters of general public interest.

III.

If the whole record is not sent up, for an order dismissing the said cause upon the ground that this court has no jurisdiction thereof under the certificate from the circuit court of appeals.

The foregoing motions are based on the record, a certified copy of which is herewith submitted, and on the certificate of the questions arising upon the record, a copy of which is hereto attached marked "Exhibit A," and upon the brief hereto attached.

J. K. RICHARDS,
Solicitor-General, Counsel for the United States, Appellant.
C. W. BUNN,
Counsel for the Appellees.

BRIEF.

This is a suit in equity which was commenced in the circuit court of the United States for the district of Washington, western division. It was brought by the United States to cancel certain patents for lands issued to the Northern Pacific Railroad Company. The facts put in issue by the bill, answer, and replication were made the subject of an agreed statement (Record, pp. 76 to 137), and are in brief as follows:

By act of Congress approved July 2, 1864 (13 Stat., 365), lands were granted to the Northern Pacific Railroad Company to aid in the construction of a line of railroad from a point on Lake Superior to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland, in the State of Oregon.

By joint resolution of Congress approved May 31, 1870, a further similar grant of lands was conferred upon the Northern Pacific Railroad Company for a line of railroad from a point at or near Portland to Puget Sound. By the terms of this joint resolution the proposed line down the valley of the Columbia River was designated as the "main line" and that portion of the line over the Cascade Mountains previously designated as the "main line" was designated as the "branch line."

On March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a sketch of the "general line" of the Northern Pacific Railroad. A copy of this map accompanies the record and is marked "Exhibit A." It shows two lines, commencing on Lake Superior, running westerly and converging near the eastern boundary of the then Territory of Dakota, and one line extending west therefrom to a point in the then Territory of Washington, near the Columbia guide meridian. From this point one line extends southwest along the valley of the Columbia River to a point near Portland, thence north to Puget Sound, while another line extends from the point of divergence over the Cascade Mountains, uniting with the first line on Puget Sound. This map was rejected by the Interior Department upon the ground that it was so indefinite as to give no basis for any withdrawals of public land and for the reason that in other respects it was not in conformity with the existing rules and regulations of the Department. (Record, pp. 85 to 95)

On July 30, 1870, two maps of general route were transmitted to the Secretary of the Interior, copies of which accompany the record and are marked "Exhibits B and C." One of these maps shows a line starting at the mouth of the Montreal River, on the boundary between Wisconsin and Michigan, and extending West to a point at the mouth of the Walla Walla River, in the then Territory of Washington. The other shows a line starting at the mouth of the Walla Walla River,

extending down the valley of the Columbia River to a point near Portland, thence north to a point on Puget Sound. These maps were, on August 13, 1870, transmitted by the Secretary of the Interior to the Commissioner of the General Land Office with instructions to withdraw from sale and entry lands within 20 miles on each side of the route so designated; and under these instructions the Commissioner withdrew lands within the prescribed limits. (Record, pp. 95 to 104.)

On September 13, 1873, under the joint resolution of May 31, 1870, the Northern Pacific Railroad Company filed its map of definite location of a portion of the line from a point near Portland to Puget Sound, namely, from Kalama to Tenino in the then Territory of Washington.

On September 22, 1882, under the joint resolution, the Northern Pacific Railroad Company filed its map of definite location of that portion of its line from Kalama to Portland. Both of these maps were approved by the Interior Department. (Record, pp. 104, 105.)

September 29, 1890, Congress passed an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," and resumed the title to all lands theretofore granted to aid in the construction of any railroad wherever the railroad opposite thereto had not been constructed. (Record, pp. 107, 108.)

All the lands described in the bill are situated opposite to and within the place or primary limits of the

grant as defined by the maps of definite location of 1873 and 1882, extending from Portland to Tenino. All of the lands described in the bill are also situated opposite to and within 40 miles of that portion of the line shown upon the Perham map of 1865 and the general route map of 1870, extending down the valley of the Columbia River to a point near Portland, and all the lands are likewise situated opposite to and within 40 miles of the line shown on the Perham map and the map of 1870, extending northward from Portland to Puget Sound. (Record, pp. 133–134.) All of the lands described in the bill were on May 31, 1870, and on the dates of the filing of the maps of definite location opposite thereto, public land to which the United States had full title, not reserved or otherwise appropriated and free from preemption or other claims or rights, unless they were reserved or appropriated by reason of the grant to the Northern Pacific Company under the act of July 2, 1864, and the maps filed and acts of the company performed in pursuance thereof. (Record, p. 134.)

The line of road extending from Portland by way of Kalama and Tenino to Puget Sound was duly constructed and approved under the provisions of the joint resolution of May 31, 1870. (Record, pp. 134, 135.) No portion of the road along the valley of the Columbia River to a point at or near Portland has ever been definitely located or constructed.

On May 23 and May 27, 1895, the United States executed and delivered to the Northern Pacific Railroad

Company letters patent for all the lands described in the bill. (Record, pp. 135, 136.)

The Northern Pacific Railway Company, a corporation organized under the laws of Wisconsin, has succeeded to all the right and title of the Northern Pacific Railroad Company to the lands in controversy, except that a large portion of the lands were, previous to the institution of the suit, sold for value to purchasers in good faith. (Record, pp. 136, 137; pp. 140 to 142.)

The lands involved in this suit aggregate about 51,569 acres.

In the courts below it was contended by the United States that under the provisions of the original granting act of July 2, 1864, and by reason of the filing of the so-called "Perham map" in 1865, the lands within 40 miles of the line so defined were reserved, withdrawn and appropriated, and were therefore not public lands of the United States on May 31, 1870, when the grant by the joint resolution approved on that day was made, and did not therefore pass to the Northern Pacific Railroad Company, although such reservation and appropriation, if any, was for the benefit of the Northern Pacific Railroad Company. The circuit court held that the case was controlled by the decision of this court in *United States* v. *Oregon and California R. R. Co.* (176 U. S., 28); and upon the strength of this decision dismissed the bill. The opinion of the circuit court is contained in the record, on pages 144 to 148.

The circuit court of appeals has certified to this court three questions, as follows:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny as against the suit of the United States the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road from a point at or near Portland to a point on Puget Sound any of the lands within the place limits of the line so designated on said maps?

I.

It is apparent from the foregoing statement that any instruction given by this court in response to the cer-

tified questions will not determine the controversy. As above stated, the Perham map was rejected by the Interior Department, and the effect of such rejection is not presented by the certified questions.

II.

In support of the motion to advance the cause it is submitted that the case is one in which the United States is concerned under the fifth subdivison of rule 26, for the reason that the United States is complainant; and that within the same rule the case involves matters affecting the general public interest for the reason that a large portion of the lands involved are held by persons who have purchased in good faith from the railroad company. The administration of all that portion of the Northern Pacific grant lying in the disputed limits must be delayed until the final determination by this court of the questions involved.

III.

The motion to dismiss for want of jurisdiction is submitted for the reason that, under the rule laid down by the decisions of this court, it appears doubtful if the certificate is in such form that the court will feel justified in considering the questions certified. It was held by this court in *McHenry* v. *Alford* (168 U. S., 651–659) that a certificate which failed to contain a statement of the facts upon which the questions of law arose would not be considered for the reason that their consideration would require an examination by the court of the whole record. The certificate in this case

fails to contain such statement, but sets forth that the facts upon which the questions of law arise are the same as those presented by the record in *United States* v. *Oregon and California R. R. Co.* (176 U. S., 28.) This requires the court to consider the whole record in the Oregon and California case—equivalent, we suggest, to requiring the court to consider the whole record in *this* case. It was, moreover, held in *Columbus Watch Co.* v. *Robbins* (148 U. S., 266) that this court had no jurisdiction to consider questions certified by the circuit court of appeals where the certificate failed to show that the members of that court were in doubt as to the proper determination of such questions, or that they desired the instruction of this court. The certificate in the present case fails to show that the judges of the circuit court of appeals are in doubt as to the proper determination of the questions certified or that they desire the instruction of this court. The certificate merely states that the case is one of which this court would have jurisdiction on appeal and is one in which an early and final decision is of public importance.

Respectfully submitted.

J. K. RICHARDS,
Solicitor-General,
Counsel for the United States, Appellant.

C. W. BUNN,
Counsel for Appellees.

EXHIBIT A.

At a stated term, to wit, the October term, A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the court room in the city and county of San Francisco on Monday, the 14th day of October, A. D. 1902.

Present: The Hon. W. B. Gilbert, circuit judge; the Hon. E. M. Ross, circuit judge, and the Hon. W. W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation, and The Northern Pacific Railway Company, a corporation, appellees. } No. 822.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

This case having come on to be heard upon the pleadings herein and the agreed statement of facts, upon an appeal whereby it is sought to review the decree of the circuit court of the United States for the district of Washington, western division, in a suit in equity brought by the United States to cancel patents for land issued to the Northern Pacific Railroad Company, and it appearing to the court that the case presents issues and facts identical with those which were involved in the case of *The United States* v. *The Oregon and California Railroad Company*, decided by the Supreme Court of the United States and reported in 176 U. S., 28, with

this difference, that the defendant, The Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to unless the fact that the Northern Pacific Railroad Company by reason of being the grantee of both said land grants is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864; and it appearing to the court that an early and final decision of said question is of great public importance, since it involves the rights of a large number of settlers on the lands in controversy, and that this is a case which is appealable to the Supreme Court from the decision of this court:

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny as against the suit of the

United States the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road from a point at or near Portland to a point on Puget Sound any of the lands within the place limits of the line so designated on said maps?

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of an order certifying certain questions to the Supreme Court of the United States in the case of *The United States of America, appellant*, v. *The Northern Pacific Railroad Co. et al.*, No. 822, as the same remains of record in my office.

Attest my hand and the seal of said circuit court of appeals at San Francisco, Cal., this 15th day of October, A. D. 1902.

[SEAL.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

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